Office-Supreme Court, U.S.
FILED
SEP 4 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 281

SARAH P. (COLBY) APPLEBY, *Petitioner*

v.

BENJAMIN COLBY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR RESPONDENT IN OPPOSITION

SHELDON E. BERNSTEIN
1001 - 15th Street, N. W.
Washington 5, D. C.

JAMES H. PUGH
Fire Department Building
Rockville, Maryland

Attorneys for Respondent

Of Counsel:

NEWMYER & BRESS
1001 - 15th Street, N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	2
COUNTER-STATEMENT OF THE FACTS	2
ARGUMENT	3
CONCLUSION	9
APPENDICES	1a

CASES CITED

American Construction Co. v. Jacksonville T. & K. W. R. Co., 148 U. S. 372 (1893)	4
Epstein v. Epstein, 193 Md. 164, 66 A. ed. 281 (1948)	5
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175 (1938)	4
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251 (1916)	4
Lau Ow Bew v. United States, 144 U. S. 47 (1892)	4
Magnum Import Co. v. Coty, 262 U. S. 159 (1923)	4
National Labor Relations Board v. Waterman S. S. Corp., 309 U. S. 206 (1940)	3
Streitwolf v. Streitwolf, 181 U. S. 179 (1901)	6
United States v. Johnston, 268 U. S. 220 (1925)	3
Williams v. North Carolina, 325 U. S. 226 (1945)	5, 6, 7, 8

TEXT

A.L.R. Conflict of Laws, Sections 18 and 19	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 281

SARAH P. (COLBY) ATELARY, *Petitioner*

v.

BENJAMIN COLBY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

---

BRIEF FOR RESPONDENT IN OPPOSITION

This is a proceeding seeking to review a judgment of the Court of Appeals of Maryland in a divorce case granting respondent-husband a divorce and finding as an incident thereof that a previous ex parte divorce obtained by the petitioner-wife, in Nevada was void because the Nevada court was without jurisdiction, in that petitioner was not a domiciliary of Nevada at the time of her application for and the granting of the divorce.

QUESTION PRESENTED

The question presented is whether a petition for a writ of certiorari will be granted where, on the pleadings, the evidence and the posture of the case below, the only real issue is whether the state trial court erred in finding as a fact, on substantial evidence, that petitioner was not a domiciliary of Nevada, and that, therefore, the Nevada court was without jurisdiction to grant her an ex parte divorce.

COUNTER-STATEMENT OF THE FACTS

Because of inability of counsel to agree further in composing the record on appeal to the Court of Appeals of Maryland, the agreed statement of undisputed facts set out in the petition (pp. 3-5) contains almost none of the mass of evidence bearing on the factual issue whether or not petitioner was truly a domiciliary of Nevada when she applied for and was granted an ex parte decree of divorce there. As indicated by the restatement of the question presented, *supra*, that was the only evidence relevant to the present matter, because the sole defensive issue raised and determined by the trial court in Montgomery County, Maryland, was whether petitioner was in fact a domiciliary of Nevada when she obtained her divorce there. That issue — the only real issue presented by the record — has been virtually abandoned in the petition's effort to conjure up an issue sufficient for presentation to this Court on petition for a writ of certiorari.

The trial record presents massive and overwhelming evidence (1) that Nevada was merely a way station utilized by petitioner en route to a second attempted marriage (Appendix A, *infra*;

(2) of a chronology of events conclusively showing that Las Vegas, Nevada, was not petitioner's home, but merely a way station to that second marriage (Appendix B, *infra*); (3) of the many things petitioner said and did from the time she left for Las Vegas conclusively showing that she did not intend to make it her home (Appendix C, *infra*); (4) reflecting on petitioner's many interests and attachments in Montgomery County, Maryland, and the greater Washington area, as compared to her minimal interests in the Nevada community which established that she never intended to give up her old home or acquire a new one in Nevada (Appendix D, *infra*); and (5) that petitioner's purported attachments to Nevada were utterly illusory (Appendix E, *infra*).

ARGUMENT

In the light of the opinions of the Maryland Court of Appeals (R. 183-199) and of the trial court (R. 16-20), and the overwhelming mass of testimony that petitioner was not a domiciliary of Nevada when she applied for and obtained her ex parte divorce, the only issue in this case was and is the *factual* one as to where petitioner's domicile really was. Any other purported questions involved are merely conjured up in a last ditch effort to upset the final judgment of the Court of Appeals of Maryland. In that context, this case presents no question appropriate for consideration on certiorari, because this Court will not grant the writ to review judgments based solely on questions of fact. *National Labor Relations Board* v. *Waterman S.S. Corp.*, 309 U. S. 206 (1940); *United States* v. *Johnston*, 268 U. S. 220

(1925); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175 (1938). Nor will the certiorari power be exercised unless the case truly presents questions of gravity and importance, or in order to secure uniformity of decision. *Magnum Import Co.* v. *Coty*, 262 U. S. 159 (1923); *Lair Oil Bow* v. *United States*, 144 U. S. 47 (1892); *American Construction Co.* v. *Jacksonville T. & K. W. R. Co.*, 148 U. S. 372 (1893); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251 (1916).

The opinions below enunciate no new principle of law. Acting within an established line of authority applying the requirements of full faith and credit to the consideration of a foreign divorce by the state of domiciliary origin, the Maryland court clearly had jurisdiction to consider the issue of fact, properly presented, whether petitioner had lost her Maryland domicile and acquired a new Nevada domicile when she applied for her Nevada divorce. Since the Maryland court so acted within established law and acted only with respect to an issue of fact, its judgment is not open to re-examination here—apart from the necessary conclusion to be drawn from the record that its determination of fact was entirely correct.

So understood, it is clear that there is no basis whatsoever for the petition. More particularly, taking the arguments of the petition seriatim:

1. There is no quarrel with the assertions that full faith and credit is to be given the judgment of a sister state, provided the sister state had proper jurisdiction and that, in attacking such jurisdiction, the burden rests heavily upon the assailant (Pet. 9-10).

As shown by the record and the opinions below, respondent demonstrated the absence of such jurisdiction by overwhelming evidence.

2. There is no quarrel with the assertion that the Nevada decree was not open to collateral attack *if* petitioner was a bona fide resident of Nevada when she obtained her divorce (Pet. 10-11). The whole question below revolved around the "if" and the record overwhelmingly established that petitioner was not a bona fide resident of Nevada when she obtained her divorce.

3. There is no quarrel with the naked assertion that petitioner had the right to go to Nevada to obtain a divorce, except insofar as it is attempted to be applied to the instant case, where that was her sole motivation and delimited the intended period of sojourn in Nevada. *Epstein* v. *Epstein*, 193 Md. 164, 66 A. 2d 381 (1948), adverted to by petitioner (Pet. 11), holds no more than that the mere fact that a marriage partner goes to another state to obtain a divorce is not subject to challenge if—and that is the big "if" in this case—in doing so he or she truly intends to make the proposed divorcing state his or her domicile or home. In the second *Williams* case, *Williams* v. *North Carolina*, 325 U. S. 226, 236 (1945), this Court found no error in an instruction to the jury trying the spouse who had obtained the ex parte divorce on a charge of bigamy by reason of his remarriage thereafter, where the charge stated that:

> "If the jury found . . . that petitioners had domicils in North Carolina and went to Nevada 'simply and solely for the purpose of obtaining' divorces, intending to return to North Carolina on obtaining them, they never lost their North

Carolina domicils nor acquired new domicils in Nevada."

Thus, an ex parte decree could not be challenged if petitioner had intended to make Nevada her true home, even though she may have gone there to make it her home because she wanted also to obtain a divorce. But if divorce was her sole reason for going to Nevada, and if she had no intention of making it her home—which, on substantial evidence, was found to be the fact below—then the Nevada decree obviously could be impeached in Maryland as it was.

Petitioner's claim that she had abandoned her Maryland domicile and never returned to that state, and hence that she acquired a legal domicile in Nevada (Pet. 11-15) is predicated on a myopic view of the limited agreed statement of undisputed facts taken together with certain minor additions adverted to in the petition's statement of facts. This claim wholly ignores the mass of evidence—most of it from petitioner's own mouth—upon which the Maryland Court properly and necessarily concluded as a fact that she was not a true domiciliary of Nevada. The implication in the petition that to conclude otherwise than as it asserts would leave a vacuum between March 4, 1955, and February 21, 1956 when petitioner was without a domicile (Pet. 14) is sheer legerdemain (1) in view of the clear fact, established by the record that petitioner never intended to give up her Maryland domicile when she left for Nevada on March 4, and (2) in view of the clear law that an existing domicile is not lost until a new one is acquired: (*Williams* v. *North Carolina*, *supra*; *Streitwolf* v. *Streitwolf*, 181 U. S. 179 (1901)).

and that the acquisition of a new domicile ". . . implies a nexus between a person and place of such permanence as to control the creaton of legal relations and responsibility of the utmost significance." *Williams* v. *North Carolina*, *supra*, 325 U. S. at 229. See also, *A. L. R. Conflict of Laws*, §§ 18 and 19.

4. The alleged fallacy in the opinions below, i.e., that the courts considered residence in Washington, D. C. or the greater Washington metropolitan area as equivalent to residence in Montgomery County, Maryland (Pet. 15-16), is merely a straw man erected to support an issue for attempted consideration here. In context, the purpose of such references was only to show that petitioner had never intended to abandon her Maryland domicile, or that she had never intended to make Nevada her home, and, therefore, could not have acquired domicile there.

To challenge the jurisdiction of the Nevada court, and establish respondent's right to relief in Maryland, it was only necessary for respondent to show —as he unequivocally did — that petitioner never intended to establish a home, in Nevada. Having thus proven that petitioner was not a domiciliary of Nevada; it became wholly irrelevant whether she intended to return to Montgomery County, Maryland, or to some other portion of the greater Washington metropolitan area, or intended to go to Timbuktu, because any existing domicile which petitioner had would continue until such time as she acquired a new one.

5. Certainly the assertion that whether petitioner was a bona fide domiciliary of Nevada was one for the Nevada court (Pet. 16) is belied by the many

decisions of this Court beginning with and stemming from the *Williams* cases holding, *inter alia*, that the issue of domicile in the context in question is not a matter of local law for the divorcing state alone, but concerns an historic notion common to all English-speaking courts, so that such a factual determination is always open to re-examination, particularly by the state of domiciliary origin which has an unquestioned interest and authority in the matter.

6. Finally, for the reasons expressed in the opinion of the Court of Appeals of Maryland, petitioner's contention that respondent is foreclosed from collaterally attacking the decree of the Nevada court (Pet. 19, *et seq.*), while novel, is utterly specious. It may be true that this Court has never decided the specific question whether facts such as relied upon by petitioner would estop or foreclose a husband from challenging the jurisdiction of a Nevada court to have granted his wife a divorce. However, clear expressions have time and again demonstrated that the power of the courts of the state of domiciliary origin to examine into the question of jurisdiction of the divorcing state are limited *only* where the challenging spouse had submitted to that jurisdiction or had been subjected to it by appropriate service of process within the jurisdiction of the divorcing court. To suggest otherwise would create anarchy, because, in every case where ex parte divorces or judgments of any kind were obtained, imposition and hardship would be worked upon the absentee parties who, to later resist or avoid subjection to the judgment so obtained, would have to show their economic or other inability to have traveled to or stayed within the jurisdiction of the court rendering the judgment in

order not to be bound by its effects. A court in which the question of jurisdiction was later raised would have to go into endless inquiries as to whether the absentee could or should have submitted himself to the jurisdiction in question. Certainly such notions are alien to historic common law concepts of jurisdiction.[1]

CONCLUSION

The record and opinions below conclusively establish that the only real issue in this case was the single question of fact whether petitioner had become a domiciliary of Nevada when she sought her ex parte divorce there, that the case thus understood does not present any issue of certiorari stature, and that the judgment of the Court of Appeals of Maryland was entirely correct and beyond challenge. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SHELDON E. BERNSTEIN
1001 - 15th Street, N. W.
Washington 5, D. C.

JAMES H. PUGH
Fire Department Building
Rockville, Maryland

Attorneys for Respondent

Of Counsel:

NEWMYER & BRESS
1001 - 15th Street, N. W.
Washington 5, D. C.

[1] Quare whether public policy indicates such an elastic concept of jurisdiction to support ex parte divorces obtained by the absentee on the basis that the mate is to be estopped to challenge jurisdiction because he or she took steps to persuade the absentee to return home.